BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31198
	)	
DIANNE GUYTON	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Office Assistant with the	)	**NO. 93-27**
State Compensation Insurance Fund	)	September 7, 1993

Appearances: Michael D. Hersh, Attorney, California State Employees Association for appellant Dianne Guyton; Donald N. Fratus, Attorney, State Compensation Insurance Fund for respondent State Compensation Insurance Fund.

Before Carpenter, President; Stoner, Vice-President; Ward, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Dianne Guyton (appellant) from dismissal from her position as an Office Assistant with the State Compensation Insurance Fund (SCIF or respondent).

Appellant was dismissed from her position as an Office Assistant for cause pursuant to Government Code, section 19572, subdivisions (b) incompetency, (c) inefficiency, (e) insubordination, and (o) willful disobedience, based upon her poor work performance and uncooperative attitude.

In a Proposed Decision, the ALJ sustained appellant's dismissal. The Board rejected the ALJ's Proposed Decision in order to review whether the principles of progressive discipline were followed in the appellant's case. After reviewing the record,

including the transcript, exhibits and written briefs of the parties[1], the Board finds that the appellant was afforded progressive discipline and sustains appellant's dismissal for the reasons set forth below.

FACTUAL SUMMARY

Appellant began her career with the State working as an Office Assistant at SCIF in September of 1988. Upon arriving at SCIF, she worked in the file room preparing litigation files, and later in the mail room sorting mail. Although she passed her probation period, her performance reviews generally listed her work habits as mediocre, and on some occasions, as needing improvement.

Appellant left SCIF in August of 1990 and transferred to the Department of Transportation. She returned to SCIF on February 11, 1991, after being rejected during probation from her position at the Department of Transportation. When she returned to SCIF, she was immediately placed in the Message Center as a switchboard operator. Appellant has no prior adverse actions.

At the time appellant returned to SCIF, she was given the formal training given to all new switchboard operators. She had approximately three days of formal training in a classroom-type setting, and thereafter, was given some brief "on the job" training whereby she sat with an experienced operator to guide her through the process. There is some discrepancy in the record as to whether

[1] No request for oral argument was filed by the parties.

the appellant received any written materials during this training period. Her supervision and trainer, Bob Rogers, claims she was given several written sheets during this time as to certain procedures. Other persons testified that all switchboard operators received manuals on the various procedures. Appellant, however, claims she never received any written instructions.

After completing the training, appellant was placed at the Message Center desk answering the telephones. Immediately, appellant's supervisor, Bob Rogers, began receiving an inordinate number of complaints concerning the appellant's performance from persons both within and outside of SCIF. These complaints concerned, among other things, appellant's rudeness on the telephone, her failure to give complete messages, and her routine misrouting of messages and phone calls to the wrong employees.

Mr. Rogers had at least two formal meetings with the appellant during the spring of 1991, attempting to give her constructive criticism and helpful information. He also claims to have had different operators sit with appellant on the phones to help further train her. He agreed to provide her with additional training himself, which he began, but never finished, because of his busy schedule and subsequent transfer to a different position.

From appellant's reinstatement in February of 1991 until August of 1991, Mr. Rogers was appellant's direct supervisor. Mr. Rogers testified that during this period of time, despite the

additional training efforts, warnings, and informal discussions he had with appellant, appellant's performance remained sub-par and he continued to get a constant stream of complaints about her work.[2] Mr. Rogers further testified that, in his estimation, appellant's attitude toward her job was quite poor, and that she made no effort to improve her work habits.

In or about July 1991, appellant's Merit Salary Adjustment (MSA) was denied by Ms. Rosemary Hookway, one of appellant's upper-level supervisors. Ms. Hookway denied appellant's MSA on the basis that appellant's performance was still the subject of the same types of numerous complaints, many more than those made concerning other operators. When Ms. Hookway or another supervisor attempted to discuss these performance problems with appellant, appellant would simply laugh, smirk, and generally refuse to talk to the supervisor about the complaints.

Along with the denial of the MSA, Ms. Hookway gave appellant a critical memorandum in July of 1991 containing a listing of what she perceived to be appellant's performance deficiencies. Also attached to this memorandum was a training schedule for the appellant. The training schedule covered almost all of the same

[2] The only evidence as to the substance of most of these specific complaints was hearsay. While the evidence establishes the fact that Rogers received numerous complaints may be considered, it is insufficient to establish the legitimacy of the complaints.

topics which the appellant was supposed to have learned at her initial training. Appellant was provided this re-training shortly thereafter by Ms. Barbara Shoreman.

While Ms. Hookway admits that appellant's performance and attitude improved slightly after the re-training, she further testified that within a few weeks, the same type of complaints began rolling in concerning the appellant, and again, according to appellant's supervisors, appellant's poor attitude resurfaced.

In August of 1991, Ms. Angely Cerezo took over as appellant's direct supervisor. Ms. Cerezo, a Senior Word Processing Technician, also testified as to the extraordinary number of complaints concerning the appellant which she received as appellant's supervisor. During the fall and winter of 1991, Ms. Cerezo issued numerous corrective and warning memoranda to the appellant, specifically detailing the substance of the numerous complaints she had received concerning the appellant. As with the other supervisors, when Ms. Cerezo attempted to meet with appellant to discuss the complaints she received, appellant would generally laugh, smirk or otherwise refuse to discuss the problem constructively.[3]

[3] Again, the content of many of the complaints was admitted into evidence only as hearsay, as the original complainants did not testify.

Ms. Cerezo, however, did provide direct testimony that appellant would often leave her post at the Message Center without advising anyone else, leaving the phones just ringing without being answered. Ms. Cerezo also testified that, in her estimation, neither appellant's work performance nor her attitude improved from August 1991 through January of 1992. Ms. Hookway's testimony corroborated Ms. Cerezo's testimony.

On December 9, 1992, the Message Center desk was being temporarily "covered" by one of SCIF's claims assistants while appellant was out on break. The claims assistant received a phone call from a panicked employee at a doctor's office. The employee called SCIF to warn them that one of SCIF's clients had just left their office and had told her that he was angry and was planning to blow up SCIF's offices that day and did not care who was killed. Just then, appellant returned to the Message Center Desk to resume her duties. The claims assistant put the doctor's employee on hold and asked appellant for assistance in handling this call as appellant was the switchboard operator in charge. Appellant told the claims assistant to do what she usually does when she gets calls of that nature -- ignore it. When the claims assistant told the appellant that she could not just ignore it, that they had to take a message and inform a supervisor, the appellant told her to throw the message away, and that if the claims assistant wouldn't do it (throw away the message), then she (the appellant) would do

it herself. The appellant admits that she may have told the claims assistant that if it was her call, she might have thrown the message away, but denies the remainder of the conversation. Fortunately, the claims assistant alerted a supervisor and the entire building was evacuated that day and no harm was done.

Appellant was subsequently dismissed for cause under Government Code, section 19572, subdivisions (b) incompetency, (c) inefficiency, (e) insubordination, and (o) willful disobedience. based upon the above instances of poor performance and misconduct.

Appellant defends this action by making several claims. One, she claims she did not receive adequate training on the duties of a switchboard operator. Two, she contends that there is insufficient evidence to sustain the dismissal against her, because most of the complaints alleged against her were hearsay and were uncorroborated. Finally, three, she asserts that she did not receive a formal adverse action previously, and thus, imposing a dismissal as a first adverse action is a violation of the principles of progressive discipline.

ISSUES

1) Was there sufficient competent evidence in the record to sustain the adverse action?

2) Is dismissal the appropriate penalty under all of the circumstances, especially in light of the doctrine of progressive discipline?

DISCUSSION

Sufficiency of the Evidence

We agree with the findings of facts and conclusions of law contained in the ALJ's proposed decision, insofar as there is sufficient evidence to support adverse action against appellant. While evidence as to the substance of the complaints received about the appellant was in the form of hearsay, and while the substance of many of the individual complaints was not corroborated, there was a great deal of direct testimony concerning appellant's misconduct. Three of appellant's supervisors spoke in great detail about appellant's poor attitude toward work and her discourteous treatment toward them. Moreover, while the substance of the complaints themselves may not form the sole basis to support the charges against appellant, as the ALJ noted in her Proposed Decision, the sheer volume of complaints lodged against the appellant is evidence that numerous SCIF employees and clients were unhappy with appellant's performance and that appellant's performance was deemed by many people to be in need of improvement. Moreover, it is clear from the record that a tremendous amount of state time was spent by fellow employees in registering their complaints, counseling appellant about these complaints and providing retraining to the appellant.

We agree with the conclusions of the ALJ and find that there is sufficient evidence in the record that the appellant was

insubordinate towards her supervisors, and incompetent and inefficient in her work performance. She was also wilfully disobedient when she failed to follow the policy for emergencies when asked how to handle a bomb threat.

Penalty

In determining the propriety of a dismissal in any case, we are bound by the test set forth in Skelly v. State Personnel Board (1973) 15 Cal.3d 194, p. 218:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or is likely to result in [h]arm to the public service. (Citations). Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence. (Id.)

Appellant's poor performance certainly harmed the public service. Appellant's supervisors spent a great deal of time investigating and responding to the unusually large number of complaints received about appellant's performance. Rather than accept the constructive criticism and strive for improvement, appellant chose to respond to her supervisors in a rude, mutinous, and sarcastic manner whenever they attempted to correct her performance. Appellant even went so far as to rip up the informal warning memoranda she received from her supervisors right in front of them. The public service is harmed when an employee refuses to respond to direction in a positive and accepting manner.

The potential harm to the public service arising out of appellant's refusal to take any action in response to a bomb threat

is of course obvious. Appellant's direction to her co-worker to ignore the bomb threat was not a simple "performance error", but a grievous act of misconduct. Appellant defends her conduct on this particular occasion by asserting that she did not receive proper training on how to handle emergencies. The testimony of appellant's supervisor, however, establishes that basic training in how to respond to emergencies was in fact given. In any event, even absent specific "training," common sense would dictate that serious threats to the safety of employees at the workplace should be reported to a supervisor immediately. Appellant's directions to her co-worker to throw the message away and ignore the threat, if they had been followed, could have put hundreds of peoples' lives at risk. Appellant's misconduct demonstrated an alarming lack of good judgment, and a complete lack of professionalism and dedication to the public service.

When the "bomb threat" incident is coupled with the fact that appellant's supervisors received an usually high number of complaints against appellant and appellant's cavalier and discourteous attitude toward her supervisors regarding the complaints, a strong pattern emerges indicating appellant's lack of concern for her job and fellow workers.

Appellant argues that the circumstances surrounding the misconduct, especially the fact that she received no prior formal discipline before being dismissed from state service, militate

against the propriety of dismissal as the penalty. We disagree.

The Board has recently addressed the issue of progressive discipline in Mercedes Manayao (1993) SPB Dec. No. 93-14. In Manayao, the Board upheld a demotion based on poor performance, even though the demotion was the first formal adverse action against Ms. Manayao. Ms. Manayao had been criticized for her poor work performance for over one year and had been issued numerous informal warnings and counseling memoranda concerning her performance deficiencies. While Ms. Manayao argued that a demotion was too harsh a formal adverse action to take in the first instance, the Board held otherwise:

> The numerous informal warnings given appellant constituted an adequate first step in the application of progressive discipline. Progressive discipline does not necessarily require a Department to use every level of informal and formal discipline to correct a particular performance problem.
>
> The purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job, prior to the imposition of harsh discipline. In this case, appellant was given numerous informal warnings as to her poor work performance and given ample opportunity to learn from her prior mistakes and to take steps to improve her performance on the job. The record shows that appellant did neither over the course of more than a year.

The facts of the instant case are similar to those in Ms. Manayao's case. Appellant was given numerous warnings about her poor work performance in the form of informal memoranda, counseling sessions, written warnings and a denial of her MSA. She

also made no sustained attempt to improve her performance in the course of approximately one year.[4]

Given appellant's record, we find the likelihood of recurrence of appellant's poor performance to be high. The numerous counselling sessions, informal reprimands, and training had little sustained impact on appellant's performance. Perhaps most significantly, appellant's unrepentant attitude and unwillingness to accept instruction increase the likelihood of repetitive performance problems.

Under all of the circumstances in this case, we believe that appellant's dismissal, although only the first formal adverse action imposed, should be sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of dismissal of Dianne Guyton from the position of Office Assistant with the State Compensation Insurance Fund is hereby sustained;

[4]While in Ms. Manayao's case, the record may not have been sufficient to justify Ms. Manayao's dismissal as opposed to her demotion, we find the circumstances present in this case (especially appellant's attitude and demonstrated lack of good judgment) justify the penalty of dismissal.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.

THE STATE PERSONNEL BOARD

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 7, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board